

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ALLEN THROM</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 193,088 & 198,794
<b>IBP, INC.</b>	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appealed the Award dated November 7, 1997, entered by Administrative Law Judge Floyd V. Palmer. The Appeals Board heard oral argument on April 15, 1998. Stacy Parkinson served as Board Member Pro Tem in place of Gary Korte who recused himself from this proceeding.

**APPEARANCES**

Seth G. Valerius of Topeka, Kansas, appeared for the claimant. Tina M. Sabag of Dakota City, Nebraska, appeared for the respondent. Michael G. Patton of Emporia, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Administrative Law Judge found that claimant had sustained permanent functional impairment as the result of two alleged work-related accidents. The Judge, however, denied the request for permanent partial disability benefits because he found claimant was not disabled for the requisite period set forth in K.S.A. 1987 and 1992 Supp. 44-501(c). Claimant appealed that award and requests an opportunity to present evidence and argument regarding the application of K.S.A. 1987 and 1992 Supp. 44-501(c). After

claimant submitted his evidence and case for decision, the law changed regarding the period of time a worker had to be disabled from earning full wages before that worker could receive permanent partial disability benefits. Therefore, the claimant did not present evidence to address that issue. The issue now before the Appeals Board is:

After the parties have submitted their evidence and when an issue arises because of a change in law, should the case be reopened for additional evidence and argument?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

Claimant alleged he sustained bilateral shoulder injuries as the result of work-related accidents occurring on October 24, 1987, and during the period from May 20, 1992, through April 13, 1993.

When the alleged accidents occurred, K.S.A. 1987 and 1992 Supp. 44-501(c) provided that employers were liable for only medical compensation unless injured workers were disabled for a certain period of time:

Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

But when the Administrative Law Judge took the parties' stipulations at the regular hearing in September 1996, the Kansas Legislature had amended that statute to delete the quoted language, thus eliminating the requirement that workers must be disabled from earning full wages for any certain period of time. The Legislature made the amendment retroactive to all claims that had not been fully adjudicated.

After claimant had submitted his claims for decision but before the Administrative Law Judge entered the Award, the Court of Appeals ruled that because of constitutional reasons the 1996 amendment to K.S.A. 44-501 could not be applied retroactively as the Legislature had intended. Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, rev. denied 262 Kan. \_\_\_\_ (1997). Therefore, when the Administrative Law Judge decided the claims in November 1997, the Judge applied Osborn and the 1987 and 1992 versions of K.S.A. 44-501(c) and denied claimant's request for permanent partial disability benefits.

The Appeals Board finds the issues surrounding K.S.A. 44-501(c) were not raised when the Judge took stipulations and identified the issues. Although the Judge listed "compensability" and "appropriate compensation" as issues, the Appeals Board finds those phrases neither raise nor place claimant on notice that respondent was either contending the

1996 amendment to K.S.A. 44-501(c) was not applicable or there was an issue whether claimant had been disabled from earning full wages for the requisite time period.

Although claimant bears the burden to prove each and every element of his claim, because the K.S.A. 44-501(c) issue was not properly raised before claimant introduced his evidence and submitted his claims for decision, claimant did not have notice or reason to present either evidence or argument on that issue. Therefore, this case should be remanded to the Administrative Law Judge for the parties to introduce their evidence and argument regarding the issues raised by K.S.A. 1987 and 1992 Supp. 44-501(c).

The Appeals Board has the authority to remand this proceeding pursuant to K.S.A. 1997 Supp. 44-551(b)(1):

On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

Fairness dictates remand is appropriate under the facts presented.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated November 7, 1997, entered by Administrative Law Judge Floyd V. Palmer is set aside and this case remanded to the Administrative Law Judge to provide the parties a reasonable opportunity to submit evidence and argument regarding the issues raised by K.S.A. 44-501(c) and for the Judge to issue a new award. The Appeals Board does not retain jurisdiction over this proceeding.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Seth G. Valerius, Topeka, KS  
Tina M. Sabag, Dakota City, NE  
Michael G. Patton, Emporia, KS  
Administrative Law Judge, Topeka, KS  
Philip S. Harness, Director